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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 213.

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UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III and JAMES BLYTHE,
Trustee for Robert A. Gilchrist, a minor, Partners, d/b/a Gilchrist & Sons; and G & R Coal Co., Inc.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

SNYDER AND RANDOLPH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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SNYDER AND RANDOLPH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents William G. Gilchrist, Jr., William G. Gilchrist, III, and James Blythe, Trustee for Robert A. Gilchrist, a minor, Partners, d/b/a Gilchrist & Sons; G & R Coal Co., Inc.; and Snyder and Randolph, Inc., in opposition to the petition for writ of certiorari filed herein, respectfully represent:

OPINION BELOW.

The Sixth Circuit s opinion, appearing in the Appendix to the Petition, is reported in 290 F. 2d 36.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED.

The statutes involved are correctly set forth in the Appendix to the Petition.

QUESTIONS PRESENTED.

1. Where the widespread and violent activities of a union had a pronounced effect and impact upon the employees of neutral employers, and were intentionally designed to induce and influence such employees to concerted action, were those activities violative of Section 303 of the Labor-Management Relations Act, 1947, or were such activities primary and protected merely because a substantial number of such events took place on the streets and highways near the business situs of a primary employer?

2. May a partnership, though claimed by the Petitioner not to have been an employer of employees primarily or secondarily involved in a labor dispute, assert an action based upon a secondary boycott violative of the Act's Section 303(b) where, as factually found by the trial court and the appellate court, the Petitioner's activities were directed against such partnership and it suffered direct damage to its business and property thereby?

3. In an action under Section 303 of the Act against a labor union for damages claimed to have resulted from a labor dispute wherein plaintiffs contended that certain actions which occurred during the dispute constituted

violations of Section 303 by the union and that the union's entire course of conduct during the dispute also constituted unlawful interference with plaintiff's businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal grounds asserted in support of the single cause of action?

4. Where a strike designed to prevent the production and sale of coal by operators not affiliated with the striking union is marked by frequent and substantial incidents of property damage and destruction, is the trial court's factual finding of union liability for damages to plaintiffs' property by clandestine use of explosives, based upon circumstantial evidence, and concurred in by the appellate court, so exceptional in character and so clearly erroneous as to be the proper subject of review by this Court on certiorari?

STATEMENT OF THE CASE.

The Facts.

Petitioner's statement of the factual background of this litigation, respondents believe, amounts to inaccuracy and omission in the composite portrayal of what actually occurred. Accordingly, the respondents feel justified in presenting a brief and accurate description of that background. This has been done so concisely by the Court of Appeals that it would appear sufficient to demonstrate that the record fully supports that resumé, thus:

"The partnership (Gilchrist & Sons) owned valuable leases on coal mining lands comprising about 37,750 acres in the Jellico area (R. 148-151). It also owned mining machinery, equipment and facilities (R 166, 188). It had been engaged in the mining and sale of coal for several years (R. 148). G & R was organized as a corporation in

1957 (R. 154). It was a closed corporation. The members of the partnership were its principal officers, directors and shareholders (R. 162-165). Shortly after its organization G & R entered in a contract with the partnership whereby the partnership agreed to furnish G & R with sites in the Jellico area for the strip mining of coal and also to furnish and maintain the necessary machinery, equipment and facilities therefor. G & R, for a stipulated price, agreed to strip mine and prepare the coal furnishing all labor and supervision therefor and to load the coal after preparation on the partnership's chosen method of conveyance (Pl. Ex. 20; R. 159, 1188-1191). The partnership also subleased lands to G & R which in turn subleased to others for auger mining and deep coal mining (R. 193). G & R subleased lands to Snyder & Randolph for auger mining (Pl. Ex. 53; R. 196, 1199-1204). Snyder & Randolph entered into an agreement with the partnership to sell it all coal produced under the sublease and the partnership agreed to account for all sales less a commission of 5% for selling and 7½% for crushing and handling the coal (Pl. Ex. 54; R. 196-197, 1204-1206). The coal mined by G & R and Snyder and Randolph was carried from the mines to tipples by independent truckers who were not employees of the plaintiffs (R. 193-194).

"Prior to the present controversy, G & R and its predecessor had signed the National Bituminous Coal Wage Agreement and various amendments with UMW (R. 206). Some of its employees belonged to the Union, but a majority did not (R. 226). The Union and the employees had little, if any, dealings and G & R paid the employees the same wages it paid its other employees engaged in road work without regard to Union pay scales and other conditions of employment (R. 191-192). Snyder & Randolph had no contractual relationship with the Union although some of its employees were members (R. 726-727).

"In December 1958 UMW negotiated an amended wage agreement with certain coal operators and sent notice that any signers of the old agreement would be expected to sign the new amended agreement and the old agreement would be cancelled at the end of 60 days (R. 873-874). G & R believed that it could not operate under the new amended agreement and refused to sign it (R. 208). G & R notified UMW of its cancellation of the old agreement as of March 2, 1959 (R. 208, 821). Snyder & Randolph likewise refused to sign the new agreement (R. 730-732).

"In February, 1959, the agents and representatives of UMW began an intensive campaign in southeastern Kentucky and northeastern Tennessee to organize the field (R. 873-875). They instructed G & R employees not to work after the old contract expired (R. 419-420). They told Snyder & Randolph that if they did not sign the amended agreement 'we will shut you down.' They stated that they took orders from Washington and intended to use whatever means were needed to carry them out (R. 730). They contacted truck owners and drivers and warned them not to deliver coal for G & R and Snyder & Randolph (R. 375, 377, 586, 643-645).

"When peaceful persuasion failed other means were adopted. Truck drivers were stopped and ordered to dump coal in the street blocking the entrance to the tipple (R. 215, 665-668). Truckers were stopped in the streets and ordered to turn around and return to Jellico (R. 370, 380). A temporary restraining order was issued on April 30th by the United States District Court at London, Kentucky at the instance of the National Labor Relations Board restraining UMW from coercing or interfering with employees of the coal industry (Pl. Ex. 58; R. 1207-1211).

"The federal court injunction did not stop the acts of violence which continued with unabated fury. On May 1, George Lindsey, a crusher operator of G & R was am-

bushed and shot at while on his way home after finding a barricade of trees and timbers on the public street which barred the path of his truck (R. 448-449). Another employee was assaulted, beaten and rendered unconscious by the use of brass knuckles (R. 483). On May 2, an independent trucker hauling coal for Snyder & Randolph was ambushed. Two tires were shot and one bullet entered the cab of his truck (R. 807). On May 3, the truck of George Bray was dynamited at his home at midnight (R. 643-644). A dynamite explosion took place at the home of Arnold Spradlin a few days after he had begun hauling coal for Snyder & Randolph (R. 347-348). At midnight on May 6, 1959 two tipples or crushers belonging to the partnership were wrecked by dynamite explosions occurring from one to five minutes apart and were of sufficient force to break windows on the main street in Jellico about a block away (R. 227, 495). On June 4 a railroad trestle serving the tipple of Snyder & Randolph at Verne, Kentucky was destroyed by dynamite (R. 743). On June 16 a large Compton auger owned by Snyder & Randolph which cost about $90,000 was almost totally destroyed by dynamite" (R. 743-744). (Record reference supplied.)

SUMMARY OF ARGUMENT.

1.

Petitioner's contention that all of its activities were confined to "entrances" to G & R job sites, and therefore not violative of § 303 of the Labor-Management Relations Act, not having been presented in either of the courts below, does not present such an exceptional situation as to warrant review by certiorari. Further, the factual situation involved in this action differed so completely from the facts in those cases upon which petitioner relies, it cannot be validly contended there is any conflict in the decision in this case with those in the opinions cited by petitioner.

2.

Gilchrist & Sons, being one of the targets of petitioner's attacks, being directly injured by the activities of petitioner, and being the owner of property and principal participant in the business destroyed by petitioner, was entitled to maintain an action for damages under § 303 of the Act.

3.

The doctrine of pendent or ancillary jurisdiction is one of general application, and there is no valid reason why it should not be applied to suits under § 303 of the Act.

4.

The responsibility of petitioner for damage to the physical properties of the respondents was essentially a question of fact, concurred in by both lower courts, the findings of which demonstrate no obvious or exceptional error requiring review by this Court.

THE ARGUMENT.

Question No. 1.

Determination by Lower Courts that Activity of Petitioner was Within Proscription of Section 303 of the Act Does Not Present a Conflict of Decision Requiring Review.

Reduced to simplicity, it is petitioner's argument that all of its activities were "primary," as distinguished from "secondary," and therefore in no instance violative of § 303 of the Labor Management Relations Act, 1947 (29 U. S. C. 187). Petitioner asserts that the decision in the instant case is in conflict with decisions of both this Court and of other Circuits. The basis of this assertion is the claim that activities of petitioner were confined to the "entrance" to the mine site of G & R and to the Gilchrist tipple where G & R processed and loaded coal. Therefore, petitioner declares, the activity at each location was primary, and the fact that it induced employees of neutrals not to haul or produce coal did not bring such activity within the proscription of § 303. This is the first time that this argument has been presented in these cases.

In the District Court the petitioner contended that it did not induce or encourage employees of employers other than plaintiffs to engage in conduct proscribed by § 303; that neither the truck owners who hauled the coal nor the underground miners were neutral employers or employees of neutral employers; and that its activities were primary as to all employees in that it was seeking to organize all employees involved, including the employees of the truckers and underground miners (R. 45, 65). In the Court of Appeals its defense that its activities did not come within the secondary boycott provisions of § 303 was reduced to the single contention that the truck drivers

engaged on a contract basis to haul coal mined by G & R were not neutral employees within the meaning of the provisions of said section (Petition for Writ, 5a).

The petitioner is asking this Court to hold that the lower courts were in error on a point that was never presented to either court for a decision. To comply with such request is to nullify the duties and services to be performed and rendered by the district courts and courts of appeal in the Federal judicial system. To avoid such a circumvention of the Federal judicial processes, and to prevent the overwhelming flow of appeals which would otherwise result, this Court has frequently stated that it sits as a court of review and that it is only in exceptional cases that it will review a question not raised in the court below. *Lawn v. United States*, 355 U. S. 339, 362, 78 S. Ct. 311, 2 L. Ed. 2d 321; *Duignan v. United States*, 274 U. S. 195, 200, 47 S. Ct. 566, 71 L. Ed. 996; *Husty v. United States*, 282 U. S. 694, 701, 702, 51 S. Ct. 240, 75 L. Ed. 629. The respondents submit that the instant cases are not such exceptional ones as to warrant review by this Court on certiorari of this newly-raised question.

Petitioner relies principally upon the opinions of this Court in *NLRB v. International Rice Milling Co.*, 341 U. S. 665, and *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB*, 366 U. S. 667. The activity of the petitioner is described and referred to as merely "picketing," and the location of such activity is repeatedly fixed as being at the "entrance" of the coal tipple and at the "entrance" of the mine. However, no amount of strained terminology can convert the facts of these cases into the factual patterns of the two cases relied upon by the petitioner. A reference to the factual findings contained in the opinions of either of the lower courts immediately dispels the tailored cloak of similarity. Such

a reference will bring into immediate focus the close resemblance between the facts in the instant cases and the facts in the cases of *United Mine Workers of America v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. denied 364 U. S. 881, and *United Mine Workers of America v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013. There, as here, violence was the hallmark of the activities of the union; there, as here, the union's method of attaining its objectives was to instill fear in the employees which it sought to induce and influence to concerted action. As in the *Osborne* case, the union activities pervaded the general area and showed a pattern of property destruction and abuse of persons at points other than the situs of the primary employer.

The petitioner admitted that it had not been designated as a representative of the employees of the respondents under the provisions of Title 29, U. S. C. A., § 159 (R. 30, 32-33). The union field representatives were seeking to persuade the non-union operators in the vicinity of Jellico, Tennessee, to sign the new contract (R. 874, 875, 925). They enlisted the active help of several union members as assistants, who were very appropriately termed "lieutenants" by the District Court (R. 108). The new contract contained a so-called "protective wage" clause, the effect of which was to prohibit a signatory to the contract from acquiring or handling coal produced by non-union operators and miners, or from leasing any coal lands to them (R. 728, 929). The field representatives and their lieutenants sought to accomplish the union objectives by preventing the independent truckers from transporting coal from the producing mines to the tipples where the coal was processed and shipped (R. 208, 214, 285, 375, 377, 422, 423, 586, 611, 645, 668, 669). It was because of the "protective wage" clause, that S & R

wanted to see whether or not Gilchrist & Sons and G & R signed the new contract (R. 728). The coal which S & R was mining was sub-leased to it by G & R and was being processed, shipped and sold by Gilchrist & Sons over their tipple. If Gilchrist & Sons and G & R signed the new contract, then S & R would necessarily have had to sign the contract, or to have given up its contracts with Gilchrist & Sons and G & R.

While the petitioner insists that its activities in the instant cases consisted of "picketing" at the "entrance" of the processing tipple and at the "entrance" of the G & R mine, the evidence does not show that its activities were so limited. The Jellico tipple of Gilchrist & Sons was located in the town of Jellico, and the evidence shows that a part of the activities of the union consisted of a display of force by numbers upon the streets of Jellico and that the employees of independent truckers were stopped on the streets of Jellico (R. 216, 282, 283, 406, 407, 417, 586, 611, 615, 643, 645, 654, 666-669, 736). The field workers, their lieutenants and pickets were at the entrance of the G & R mine on only one occasion, and that was the time when they went to the strip pit and by display of force, threats and abuse closed down the mining operation (R. 403, 405, 424-427, 532, 538). However, on numerous other occasions, the field representatives and their assistants intercepted the employee-drivers of the independent truckers at a point on the public highway about two miles distant from the G & R mine; it was at this point that they stopped the trucks, threatened the drivers, forced them to turn their trucks around and return to Jellico (R. 370, 380), and told them that there would be no more coal hauling until the new contract was signed (R. 370, 375). The employees of truckers who were hauling coal for S & R were intercepted on the streets of Jellico at a point approximately six

miles from the S & R mine (R. 586, 666-669). Truckers who persisted in attempting to haul coal to the tipple of Gilchrist & Sons had their trucks dynamited at their homes (R. 347, 644), and shot into on the highways (R. 807). Employees of truckers who were hauling coal from the small deep mines to the partnership tipple were also induced and influenced to concerted refusal to transport coal because of the widespread and violent activities of the petitioner (R. 610, 611, 615, 616).

Rice Milling was based entirely upon one isolated incident. Two employees of a neutral customer were turned back by pickets as they approached the struck mill. This Court decided the one event did not amount to an inducement of neutral employees to concerted action, saying:

> "While each case must be considered in the light of its surrounding circumstances yet the applicable proscriptions of § 8(b)(4) are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer.
>
> * * * * *
>
> "The limitation of the complaint to an incident in the geographically restricted area near the mill was significant although not necessarily conclusive.
>
> * * * * *
>
> "A union's inducements or encouragements reaching individual employees of neutral employers *only as they happen to approach* the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore such actions do not come within the proscriptions of § 8(b)(4), and they do not here."

Petitioner's present argument, not presented in the District Court nor Court of Appeals, really flowers from petitioner's interpretation of the Court's opinion in *Local*

761, International Union of Electrical, Radio & Machine Workers v. NLRB, 366 U. S. 667. A brief resumé of that opinion appears to be appropriate.

Involved was General Electric's thousand-acre Appliance Park near Louisville. This situs had five entrances (over culverts) called gates. GE had designated Gate 3-A for the use of employees of independent contractors, and had forbidden its own employees to use it. During a strike of a majority of GE's employees, all gates, including 3-A, were picketed. This Court considered it significant enough to point out that there was no contention the picketing "was other than peaceful in nature" (p. 670). In its decision of whether or not the peaceful picketing at Gate 3-A was violative of the Act, this Court said (p. 672) § 8(b)(4)(A) "could not be literally construed; otherwise it would ban most strikes historically considered to be *lawful*, so-called primary activity. * * * Congress did not seek by § 8(b)(4), to interfere with the ordinary strike * * *." (Emphasis ours.)

The Court observed that all picketing is motivated, at least in part, by the *hope* that all persons, including the employees of third parties, will respect the picket line and thereby exert some outside pressures on the struck employer. "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer."

Noting that "the distinction between legitimate 'primary activity' and banned 'secondary activity' * * * does not present a glaringly bright line" (p. 673), the Court reviewed the history of the Board's interpretation of § 8(b)(4)(A) in light of "unfolding variant situations." It is said (p. 674):

> "* * * the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although no rigid rule which would make * * * a few factors conclusive is contained in or deducible from the statute, * * * In the absence of admissions by the union of an illegal intent, the nature of the acts performed shows the intent."

The Court pointed out that early decisions made the location of the activities the standard by which picketing was determined to be primary and permissible, or secondary and prohibited. However, the complexities arising from the "protean forms" of conduct required a more flexible standard, the Board realizing "There must be a balance between the Union's right to picket and the interest of the secondary employer in being free from picketing."

The facile geographical standard was abandoned, and (p. 679) "In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in Rice Milling, in which we indicated that the location of the picketing at the primary employer's premises was 'not necessarily conclusive' of its legality." The Court said (pp. 680, 681) in this case "the precise nature of the issue * * * is whether the Board may apply the Dry Dock criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employers' premises. The effect of such a holding would not bar the union from picketing at all gates used by the employees, suppliers, and customers of the struck employer. Of course, an employer may not, by removing all his employees from the situs of the strike, bar the union from publicizing its cause * * *.

* * * * *

"The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on *traditional primary* activity of appealing to neutral employees whose tasks aid the employer's everyday operations. The 1959 Amendments to the National Labor Relations Act, which removed the word 'concerted' from the boycott provisions, included a proviso that 'nothing contained in this clause (B) shall be construed to make unlawful, *where not otherwise unlawful*, any *primary* strike or *primary* picketing.'" (Emphasis ours.)

As this Court has observed, it is unlikely that any amount of dissection and analysis will supply a neat, simple and infallible formula for distinguishing the "fine line" between primary and secondary activity. Inherent within the dual Congressional objectives are the flow of conflicting forces and contradictory goals. Nevertheless, certain principles have evolved.

The location of the activity may be significant, but it is certainly not conclusive.

The test consists of examining conduct and objectives.

The right of unions to "publicize" their cause must be preserved. This is "traditional primary activity," or an "ordinary strike."

Such traditional primary activity does not become prohibited merely because picketing is done in the "hope" that other employers and employees will be influenced to action "only as they happen to approach the picketed place of business."

Conspicuously absent from these generalities is any sanction of the use of violence as a traditional or protected activity. Primary activity does not become secondary because it is violent, but neither is it a protected course of conduct, and this Court has noted that "the nature of the acts performed shows the intent."

A condensed pandect of this Court's enunciations relevant to this question could fairly include: (1) Inducement or encouragement which naturally and incidentally results from peaceful and traditional picketing is not proscribed by the Act merely because the picketing union hopes for such result, and can therefore be said to have it as an objective. (2) This is true of peaceful picketing at a primary employer's job site not used by the struck employer's employees, but used by neutral employees performing work necessary to the normal operations of the business. (3) On the other hand, deliberate and intentional inducement of the employees of neutral persons to a concerted action, with the aggressive and immediate purpose of involving neutral parties, and through them exerting pressure upon the primary employer, is prohibited, regardless of where it takes place. (*NLRB v. Denver Building & Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers, Local 501, A. F. of L. v. NLRB*, 341 U. S. 694; *Local 74, United Brotherhood of Carpenters & Joiners of America v. NLRB*, 341 U. S. 707.)

As demonstrated by the Court of Appeals' review of the evidence (unchallenged by petitioner), this was not a

case where the union limited itself to peaceful and traditional picketing in the hope that third persons would be influenced as they happened to approach the picket line. On the contrary, the petitioner's adherents saw to it that neutrals would be not only influenced, but dissuaded from doing any business with the primary employers who were the objects of its activity. It activated its members not only in the vicinity of the Jellico tipples, but on the public highways two miles away from any job site of any employer, on the streets of Jellico generally, and even to the home of neutral employees still willing to risk lawful work in the face of an organized belligerence. It did not *hope* that truck drivers of neutral employees would be influenced. It intercepted the truck drivers, told them in no uncertain terms not to return with any more coal, and to convey the message to other truck drivers to respect the same injunction, which was done (R. 586-587). The union was not soliciting the driver to become a member (R. 587). These flagrant violations of law were not only vigorous, but effective. It was made clear that trucking employees were subjected to violence and intimidation which induced them to concerted action against their neutral employer, even while employees of S & R continued their efforts to produce coal (R. 734-736). This was in fulfillment of a promise to the president of S & R that the petitioner would shut down his operation "by any means that is required" (R. 730). Further, a part of this activity was carried on at the Gilchrist tipples in Jellico, miles away from S & R's site of operation, at a time when the tipples were being operated for the sole purpose of processing and loading S & R's coal (R. 222-223).

It is suggested that the S & R case "presents another of the protean forms of activity that may arise" because the petitioner "was engaged in a dispute with two em-

ployers simultaneously." As is obvious from the record, the petitioner was engaged in a dispute with dozens of employers, and with everyone who presented an obstacle to its avowed intent to bring into its fold every operator in the area who had not signed its contract (R. 874).

It was certainly not engaged in the innocuous publicizing of its cause when its two principal proponents sallied forth in the middle of the night because they heard that S & R was going to operate a night shift; went to the Gilchrist tipple in Jellico; and there intercepted a truck driver, the employee of a complete neutral, and made him dump his coal out into the street in such fashion that it blocked the entrance to the tipple (R. 215, 665-668). Not only so, but they waited in the neighborhood for another anticipated driver so that he might be subjected to the same treatment (R. 846).

The petitioner asserts that "nothing in the circumstances indicates any * * * intent or object" to cause "S & R to cease doing business with Gilchrist and Sons." To refute this contention, the Court is respectfully referred to a record which shows the contrary (R. 208, 214, 221, 287, 288, 304).

There is no conflict in the decision in the instant cases and the cited decisions. In an effort to show that the Court of Appeals was in error, the petitioner quotes from the opinion of that Court in the *Osborne* case; it is, of course, unable to quote from the opinion in the present cases as this question was not presented to the lower court for decision and it is nowhere mentioned in the opinion. Yet, petitioner urges that it is upon this question that the decision in respondents' cases conflicts with the decisions of this Court and with the decisions of other Courts of Appeals.

In the course of this phase of its argument, petitioner makes the statement that the District Court for the Eastern District of Kentucky, where a number of cases are pending against the petitioner arising out of its 1959 activities, indicated "on June 26, 1961, that there would be no further adjudication until further clarification by this Court in the instant cases." Kentucky counsel for respondents know of no such indication having been given by the district court referred to; however, counsel do know that they have such a case assigned for trial in that court on October 2, 1961, and that they are making full preparation for the trial of same on that date. They also know that Kentucky counsel for the petitioner are proceeding with pre-trial discovery for the trial of other cases on the docket in that district court.

As is evident from the record, from the findings of the District Court, and from the resumé by the Court of Appeals, the petitioner is now in difficulty because its agents and representatives launched a vicious and violent campaign to force recognition from every coal operator in the district. It pursued this objective with a reckless disregard of the identity, function or relationship of the persons whom it involved. It announced its intent to close down the operations of the respondents by whatever means were found necessary, and it fulfilled that promise by violence, intimidation and serious property damage.

It is respectfully submitted that this is not the type of traditional union activity which the Congress has enjoined upon the courts to protect and preserve, nor has this Court ever so indicated.

Question No. 2.

Determination by Lower Court That Partnership Was Entitled to Maintain an Action Under Section 303 of the Act is Correct.

The lower courts made concurrent findings of fact that the petitioner's activities were directed against Gilchrist & Sons as well as against G & R and S & R, and that they suffered direct damage to their business and property as a result of such activities. However, petitioner contends that the lower courts were in error in holding that the partnership could invoke jurisdiction under Section 303 of the Act in seeking recovery for such damage, giving as its reasons that such a holding conflicts with Congressional intent in the enactment of § 303 and conflicts with the Court of Appeals' own decision in *United Mine Workers of America v. Love and Amos Coal Company*, 6 Cir., 279 F. 2d 716.

Petitioner says there is no distinction between the relationship of Gilchrist & Sons to G & R and the relationship of Love and Amos to Osborne Mining Company, and upon this false premise its argument of conflict of decision is made. Love and Amos was a coal sales agency with offices in a city distant from the coal mining area of Osborne Mining Company. There it engaged in the business of selling coal upon a commission basis, of various coal mining companies, including the coal of Osborne Mining Company. In fact, this same Love and Amos was one of the coal sales agencies handling the sale of the coal of Gilchrist & Sons in this case (R. 204). To say that Gilchrist & Sons in the present case occupies the same comparative position as that occupied by Love and Amos in the *Love and Amos* case cannot be supported by the record.

The over-all coal mining operation in the present case was that of Gilchrist & Sons. The part played by G & R

in this operation was not a separate and distinct function which could be carried on separate and apart from the activities of Gilchrist & Sons in the over-all operation. To the contrary, G & R furnished a service in the integrated operation in which it was engaged with Gilchrist & Sons. The contract between Gilchrist & Sons and G & R clearly shows that G & R was merely furnishing the necessary labor, and supervision over this labor, to mine and produce coal belonging to the partnership, and to provide for its delivery into the railroad cars at the processing tipples of the partnership. The coal which G & R mined for the partnership was the coal of the partnership while in the ground and at all other times. The machinery and equipment used by G & R in mining the coal was furnished by the partnership and was maintained by the partnership. The partnership furnished the necessary repair parts, and furnished the fuel, grease and lubricating oil required in the operation of the equipment (R. 1188-1191). The partnership provided the processing ramps or tipples over which the partnership coal was processed and loaded into railroad cars by labor supplied by G & R.

The partnership and G & R occupied joint offices near the site of the processing plants. These offices were furnished at the expense of the partnership, which not only paid the rent, but supplied at its own expense the utilities and telephone service (R. 259). An office manager and bookkeeper had general supervision of the common offices and of the books and records for both companies, and his entire services were paid for by G & R (R. 247, 248). A secretary and bookkeeping assistant, who did secretarial work and bookkeeping work for both companies, had her entire services paid for by the partnership (R. 276). William G. Gilchrist, Jr., who devoted his full time to the over-all supervision of the coal mining operations, and his

son, William G. Gilchrist, III, who devoted a part of his time to assisting his father in the over-all supervision of the coal mining operation, were both paid by the partnership and received no compensation from G & R (R. 165, 235).

G & R, for supplying the labor and supervision to strip mine the coal and place it in the railroad cars, was paid a fixed price per ton. It did not receive any part of the proceeds of the sale of the coal, and had nothing to do with the sale of same (R. 204). The partnership arranged for the sale of the coal, selling it through various coal sales agencies throughout the country, including Love and Amos, which coal sales agencies charged Gilchrist & Sons the usual sales commission. Gilchrist & Sons retained the full sales proceeds received by the sales (R. 183, 187, 275).

In the light of these facts, it is difficult to understand how the petitioner can seriously urge the Court that the relationship between Gilchrist & Sons and G & R corresponds to that of Love and Amos Coal Company and Osborne Mining Company, and that, therefore, the present decision conflicts with the decision in the *Love and Amos* case. To the contrary, it clearly appears from the undisputed facts that Gilchrist & Sons were directly affected and injured by the secondary boycott activities of the petitioner, and that it was within the target areas against which the petitioner was directing such activities, and that the injury and damage which it sustained as a result of such activities are separate and apart from the injury and damage sustained by G & R, and both lower courts so held.

Petitioner's contention that the present decision is in conflict with the Congressional intent in the enactment of § 303 is based upon Congressional history of the Act indicating that the participating members of Congress were conscious that the provisions of § 303(b) paralleled § 4 of

the Sherman Act, and that recovery should have been denied to Gilchrist & Sons under the cases construing § 4 of the Sherman Act. In *United Brick & Clay Workers v. Deena Artware*, 6 Cir., 198 F. 2d 637, the Court of Appeals refused to adopt a restricted construction of § 303(b). The court pointed out that Congress made a secondary boycott illegal by the enactment of the Labor-Management Relations Act of 1947, and, further, that (p. 644) "In doing so it used the broad and inclusive language 'Whoever shall be injured.' The legislative history was that Congress was aware of the broad coverage provided by this phrase. 93 Congressional Record, May 9, 1947, 4843-46, 4858, 4872-73. If it had intended to limit the right of action to innocent third-party employers, it could easily have done so. If Congress considered the use of the secondary boycott in a labor dispute as unfair labor practice and illegal, as it did by the enactment of the Labor-Management Relations Act of 1947, it was entirely consistent with such decision to give a right of action to anyone who was injured in his business by a violation of the law thereafter." In conclusion, the court stated that (p. 644) "We are of the opinion that in the present case the word 'whoever' has a plain, unambiguous meaning which we are not authorized to disregard and as so construed it includes the Appellee." One of the cases cited in support of this opinion is that of *Helvering v. City Bank Farmers Trust Company*, 296 U. S. 85, 88-89, wherein Justice Roberts, in interpreting the phrase "any person" as used in § 302(d) of the Revenue Act of 1926, stated (p. 89), "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used." The decision in the *Deena Artware* case is certainly consistent with the decision in the present case.

The petitioner would have the Court construe § 303 (b) in the light of certain particular cases construing § 4 of the Sherman Act. These selected cases are not analogous to the type of relationship which existed between Gilchrist & Sons and G & R. In interpreting that part of § 4 of the Sherman Act providing "* * * any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States * * *," the courts, while recognizing that "the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury to his business or property by reason of wrongful acts" (*Clark Oil Company v. Phillips Petroleum Company*, 8 Cir., 148 F. 2d 580, 582), have continually approached this problem from a point of view limited by the declaration that the "right which (the anti-trust laws) give to a person to recover three-fold the damages he has sustained, is an unusual one, the remedy is drastic, and the Acts are to be strictly construed and not to be enlarged by construction." *Image and Sound Service Corporation v. Altec Service Corporation*, D. C. Mass., 148 F. Supp. 237, 239. The courts have been constantly on the alert to withhold recovery "from those who seek the windfall of treble damages, because of incidental harm." *Conference of Studio Unions v. Loew's, Inc.*, 9 Cir., 193 F. 2d 51, 55. However, even under this restricted construction of § 4 of the Sherman Act, the courts have authorized recovery by persons not in privity with the wrongdoer where they met the test of direct injury to their property, or to an established business in which they had an interest or had a right to continue to expand without unlawful interference by the wrongdoer. *McWhirter v. Monroe Calculating Machine Company*, D. C. Mo., 76 F. Supp. 456; *Midland Oil Company v. Sinclair Refining Company*, D. C. Ill.,

41 F. Supp. 436; *Roseland v. Phister Mfg. Company*, 7 Cir. 125 F. 2d 417; *Karseal Corporation v. Richfield Oil Company*, 9 Cir., 221 F. 2d 358, 271 F. 2d 709, 361 U. S. 961.

The *Karseal* case, *supra*, is particularly illustrative of the principle that a remedy is afforded to those who are directly injured, even though they were not directly involved in the proscribed activity. Karseal was a manufacturer of wax, selling it to independent distributors, who in turn were prevented or impeded in selling it to independent Richfield service stations by reason of Richfield's requirement that the station operators handle only products sponsored by Richfield. There the pressure was upon the independent retailer. Karseal was two steps removed from the monopolistic pressure. Nevertheless, Karseal was permitted to recover, the Court concluding (p. 365):

> "The Congress in the Clayton Act, stated in Sec. 4 'Any person who shall be injured * * * may sue * * *.' The Congress did not attempt to limit the relief to those manufacturing or distributing."

The basic goal of Prater and Daniel during the course of the activities in which they were engaged on behalf of the union during this period was to persuade all of the coal companies in their area who had not signed the new wage agreement, to sign (R. 208, 214, 278, 873, 874). The most effective way for them to shut down these reluctant coal companies and to bring persuasive pressure upon them was the way that they adopted; that is, to close down the coal tipples and ramps so that there would be no place to take the coal after it was mined. Prater and Daniel and their lieutenants concentrated their efforts, primarily upon keeping the coal tipples shut down, including the tipples of Gilchrist & Sons, and on stopping the trucks from transporting the coal from the mining

sites to the coal tipples, including the tipples of Gilchrist & Sons. If they could prevent any coal from being shipped out of their area, then the coal companies would have to either sign the contract or go out of business. The union was not satisfied with coercing or intimidating the employees working on the coal tipples, or the drivers operating the trucks, but proceeded to damage and destroy the tipples and the trucks also. Certainly, Gilchrist & Sons and their business and property were within the "target area" aimed at by Prater and Daniel in the conduct of these activities. Not only aimed at, but hit.

In the case of *United Mine Workers v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, the relationship between Meadow Creek Coal Company and Tennessee Coal Company was almost identical with that of Gilchrist & Sons and G & R. This relationship is described on pages 56 and 57 of the opinion of the court in the *Meadow Creek* case, as follows:

> "On account of the apparent animosity of the appellant toward appellee's president, the appellee company decided to organize a new company to operate the mine and deliver coal to appellee, in railroad cars or trucks, at the mouth of the mine. To consummate this, a corporation known as 'Tennessee Coal Company' was organized under the laws of Tennessee. This new company entered into a contract with Meadow Creek Coal Company under the terms of which the new corporation would use the equipment of appellee to mine the coal and deliver it to appellee as planned. Appellee contracted to pay the Tennessee Coal Company the actual cost of mining the coal, plus ten cents per ton.
>
> "It was agreed that the coal, both in the ground and at all times, belonged to appellee; and that the Tennessee Coal Company had only the right to mine

> and produce it. Appellee sold the coal and received all proceeds from sales. * * * Appellee rendered aid to the Tennessee Coal Company in its mining and production operation and paid salaries to some of its administrative officers and employees."

As to whether or not the issue of the right of Meadow Creek to maintain their action under § 303(b) was raised before the District Court, we do not know; but, evidently, the District Court found it necessary to make findings of fact on the relationship between Meadow Creek and Tennessee Coal Company, and these findings were of sufficient importance to be incorporated in the opinion of the Court of Appeals, and, under such factual situation, Meadow Creek was allowed to successfully maintain its action.

In the case of *Curto v. Int'l Longshoremen's & W. Union*, D. Ore., 107 F. Supp. 805, aff'd sub nom., *Int'l L. & W. Union v. Hawaiian Pineapple Co.*, 9 Cir., 226 F. 2d 875, cert. denied 351 U. S. 963, recovery was allowed to Hawaiian Pineapple Company against the Longshoremen's Union under § 303 of the Act even though the union was only attempting to prevent Pineapple from unloading its cargo and was not engaged in a dispute with Pineapple nor with anyone with whom Pineapple had dealt or was dealing in loading, transporting and unloading of the cargo. In passing upon motions for a new trial, the District Court stated that the evidence showed that (p. 812):

> "The object of the longshoremen was to isolate the cargo and prevent it from being handled by anyone and particularly transported. Therefore, it was one of the objects of the action to force or require the other persons and corporations to cease dealing with Pineapple and to cease dealing with others. Not only was this the object of the compulsion, but it was effective. But the statute only required that this be one of the objects."

The evidence is clear in the present case that the defendant union effectively moved to boycott the receiving and processing of coal at and over the tipples of Gilchrist & Sons, compelling the partnership to cease dealing with any and all persons who were bringing coal there, all for the purpose of bringing pressure on the coal companies and operators who had failed or refused to sign the new wage agreement. A complete stoppage and destruction of these business relationships resulted to the partnership as a direct and proximate result of these activities of the union, for which it is entitled to recover, as provided for by § 303 (b) of the Labor-Management Relations Act.

As so accurately and clearly stated by the Court of Appeals (Appendix to Petition, 6a):

> "The damage sustained by the partnership was direct and not remote, indirect or incidental. Its physical property was damaged by the dynamiting. Its coal business was disrupted and destroyed. It did not claim damage because of the destruction of the business of G & R as in Love and Amos. In our opinion, the plain language of the Act 'whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue * * *' authorized the suit by the partnership which was directly injured in its business and property by reason of the violation of the Act by UMW."

Question No. 3.

Application of Doctrine of Ancillary or Pendent Jurisdiction in Present Cases Is Not in Conflict With Congressional Intent in Enactment of § 303 of Act.

Despite adverse rulings in the recent cases of *United Mine Workers of America v. Meadow Creek Coal Company*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, and *United Mine Workers of America v. Osborne Mining Company, Inc.*, 6 Cir., 279 F. 2d 716, cert. denied 364 U. S. 881, where this identical contention was argued at length, the petitioner continues to insist that actions under § 303 of the Labor-Management Relations Act of 1947 should be an exception to the doctrine of ancillary or pendent jurisdiction. The *Meadow Creek* and the *Osborne* cases were preceded by a long line of cases which had their origin in *Siler v. L & N Ry. Co.*, 213 U. S. 175, and *Hurn v. Oursler*, 289 U. S. 238. In applying this jurisdictional doctrine, the party against whom it is applied usually makes the contention that the case involved should be an exception to the rule. The Court gives full answer to this argument in the case of *Hurn v. Oursler, supra*, in response to the question of whether cases involving patents, trademarks and copyrights constitute an exception to the general rule, at page 245 of the opinion, as follows:

> "The Siler and like cases announce the rule broadly without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such—as controlling in patent, trademark and copyright cases as it was in the cases where it is announced."

Since this precise question was recently presented to this Court in the *Osborne* case, *supra*, wherein counsel for respondent ably demonstrated that the doctrine of an-

cillary or pendent jurisdiction is "a rule of general application," we again call to the Court's attention the authorities cited in that case. The doctrine now questioned by petitioner has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn v. Oursler, supra; Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315 (1939); *in re Amtorg Trading Corp.*, 75 Fed. 2d 826 (Ct. of Patent App., 1935); *Edelman & Co. v. AAA Specialty Company*, 88 Fed 2d 852 (7th Cir., 1937); *Sinko v. Snow-Craggs Corporation*, 105 Fed. 2d 450 (7th Cir., 1939); *Maternally Yours v. Your Maternity Shop*, 234 Fed. 2d 538 (2nd Cir., 1956).

(2) Under the Jones Act wherein claims are combined for unseaworthiness and maintenance and cure with an admiralty claim in such cases as *Jordine v. Walling*, 185 Fed. 2d 662 (3rd Cir., 1950); *Troupe v. Transit Company*, 234 Fed. 2d 253 (2nd Cir., 1956); *Doucette v. Vincent*, 194 Fed. 2d 834 (1st Cir., 1952).

(3) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company v. Van Hoosar*, 72 Fed. 2d 903 (9th Cir., 1934); *Strachman v. Palmer*, 177 Fed. 2d 427 (1st Cir., 1949); *Chicago Great Western Railway Co. v. Chicago, Burlington and Quincy Railway Co.*, 193 Fed. 2d 975 (8th Cir., 1952).

(4) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion v. Connell*, 236 Fed. 2d 447 (9th Cir., 1956); *Jung v. K & D Mining Co.*, 260 Fed. 2d 607 (7th Cir., 1958).

(5) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *Southside Theatres v. United West Coast Theatres Corporation*, 178 Fed. 2d 648 (9th Cir., 1949); *Braddick v. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(6) In cases wherein claims under the Fair Labor Standards Act are combined with claims for compensation outside of said acts in such cases as *Manosky v. Bethlehem Hingham Shipyard*, 177 Fed. 2d 529 (1st Cir., 1949); *Hogue v. National Automatic Parts Association*, 87 Fed. Supp. 816 (E. D. Mich., 1949); *Wertanen et al. v. Welduction Corporation*, 151 Fed. Supp. 440 (E. D. Mich., 1957).

(7) In cases wherein claims under statutes relating to national banks are combined with claims under the state or common law in such cases as *Gulley v. First National Bank of Meridian*, 81 Fed. 2d 502 (5th Cir., 1936).

(8) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company v. Owensboro Milling Company*, 222 Fed. 2d 109 (6th Cir., 1955).

Applicable to this case, as in the *Osborne* case, is the quotation from *Errion v. Connell*, 236 Fed. 2d 447:

> "It is alleged in the complaint in our case, and the trial court found, a *single cause of action* involving a *single fraudulent scheme* to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the Federal Court had jurisdiction, and the other non-securities over which the Federal Court normally has

> no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two lawsuits in this situation is untenable. We, therefore, hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

Here, as in the *Osborne* case, the petitioner claims a conflict with the opinions in *United Mine Workers of America v. Patton*, 4th Cir., 211 Fed. 2d 742, and *Apex Hosiery Co. v. Leader*, 310 U. S. 469, and *Hunt v. Crumboch*, 325 U. S. 821.

It is pointed out in respondent's brief opposing the Osborne petition that the Court of Appeals made no reference to the doctrine of pendent jurisdiction in the *Patton* case, where the wrongs alleged were wholly "encompassed in the remedy afforded by the Federal Statute." In the *Apex* and *Crumboch* cases the doctrine was not asserted by plaintiff, nor did the facts alleged in the complaint present even colorable federal claims, a prerequisite to any exercise of pendent jurisdiction.

Question No. 4.

Concurrent Findings of the Two Courts Below That Petitioner Was Liable for Damages to Respondents' Property Is Supported by Evidence.

Petitioner argues that the findings of the lower courts that it was liable for damages to respondents' property raises a problem which is "predominately one of law" and that such findings conflict with the decisions in the cases of *U. S. v. White*, 322 U. S. 694, *International Ladies Garment Workers Union v. NLRB*, 237 F. 2d 545, and *NLRB v. Tex-O-Kan Flour Mills, Inc.*, 222 F. 2d 433. The *White* case was decided in 1944 and involved a criminal contempt proceed-

ing; the *Ladies Garment Workers* case involved a petition to review and set aside an order of the National Labor Relations Board and dealt with the rights of individual strikers to re-employment; the *Tex-O-Kan Flour Mills* case was decided in 1941 and involved a cease and desist order sought by the National Labor Relations Board and an order to compel reinstatement of employees. To say that either of these cases conflict with the decision in respondents' cases requires a definition or concept of the term "conflict" beyond its recognized meaning.

The findings of the lower courts on this point do not raise, as posed, a question of law, but raise only a question of fact. The petitioner is, of course, familiar with the "seasoned and wise rule of this Court" making concurrent findings of fact of two courts below final in the absence of a very obvious and exceptional showing of error. *Comstock v. Institutional Investors*, 335 U. S. 211, 214, *Graver Manufacturing Co. v. Linde Co.*, 336 U. S. 271, 275. The real question here is whether or not the petitioner has demonstrated that these concurrent findings of fact of the two courts below constitute error of an obvious and exceptional character. A determination of this question requires a review of the evidence and the inferences to be drawn from it.

As an introduction to the question of the responsibility of the petitioner, these unchallenged findings of the District Court are of importance (R. 108, 110, 118):

> "(5) In February, 1959, the agents and representatives of the UMW began an intensive campaign in southeastern Kentucky and northeastern Tennessee to organize the field.
>
> "(6) The task of persuading mine operators in the Jellico, Tennessee, area to sign the amended wage agreement was delegated by the Union principally to

William Prater and Ed Daniel, district representatives of the defendant Union, in accordance with previous practice.

"(7) Prater and Daniel, as agents of the defendant Union, and in prosecution of an organizing campaign in the Union's behalf, enlisted a number of lieutenants to assist in the organizational activities.

* * *

"(13) During this period, Prater and Daniel and members of the local unions from nearby areas and various pensioners of the defendant assembled day and night in large crowds on the streets of Jellico and from time to time drove in motorcades consisting of numerous automobiles around the mining areas with placards indicating their purpose to advertise their 'No Contract, No Work' tradition and campaign.

* * *

"(31) Daniel and Prater were furthering the interest of the defendant in their organizational activities. The defendant advanced large sums of money to support these organizational activities including two and one-half million dollars during the year 1959. The Union activities in the area induced and encouraged the employees of the employers to engage in a concerted refusal to mine and haul coal."

Copies of the new wage agreement, containing the "protective wage" clause, were furnished to Prater and Daniel by the district office, and they had no authority to make any changes or alterations in the contract which they were undertaking to persuade the coal operators to sign (R. 875). Prater made arrangements for meals to be furnished to his crew of lieutenants at certain restaurants in Whitley County, Kentucky, and in Campbell County, Tennessee, and arranged the payment of gasoline and automobile supplies furnished to the owners and operators of automobiles used in carrying out the activities (R. 504-509,

876-879). Prater bought four pistols from one of these restaurant operators, Malcom Jackson (R. 509). On several of the occasions when Prater and Daniel and their assistants were threatening and intimidating the employees of the primary and secondary employers there was evidence that members of the union group were armed (R. 344-346, 404, 419, 420, 426, 448, 449, 531, 539, 668, 669). The evidence showed a pattern of the use of explosives to damage and destroy the property of employers and employees, who were attempting to work in the Jellico area (R. 227, 617-621, 632-634, 644, 680, 681, 742-744). Prater and Daniel made several statements which indicated their planned mode of operation in enforcing the union objectives. Prater advised William G. Gilchrist, Jr., that "he had been sent there with instructions to shut everybody down that didn't sign the contract, and he hoped he wouldn't have to use any violence to do it, but he intended to shut us down at any cost if we didn't sign the contract" (R. 208). Prater told Robert Randolph that if S & R did not sign the contract "we will shut you down." When Randolph questioned his right to do so, Prater answered, "I don't need any legal right. I take my orders from the Washington office." When Randolph asked Prater how he intended to stop them, he said "By any means that is required" (R. 730). On another occasion when Randolph was at the partnership tipple Daniel told him that "there wasn't going to be any more goddamned coal put over that ramp" (R. 733, 734).

Meetings were held between union officials and representatives of the coal operators in Washington, D. C., and in Frankfort, Kentucky, with regard to the problems which had developed. At these meetings high officers in the union were quoted as saying that the way to cut down further trouble was for the operators to sign the contract (R. 388,

390, 472, 474). On April 30, 1959, at the request of the National Labor Relations Board, the District Court for the Eastern District of Kentucky issued a temporary restraining order restraining the union from further acts of violence and disorder. At a subsequent hearing the union consented that the restraining order be continued in effect indefinitely (R. 219, 220).

Various members of the group of lieutenants of Prater and Daniel were implicated in incidents of violence to persons and property. Bob Bailey was identified as one of a group who ambushed and shot into the truck of George Lindsay, crusher operator employed by G & R (R. 461). Walter Fuson, crusher employee of G & R, was assaulted, beaten and knocked unconscious by George Smith, Jr., using a pair of brass knucks (R. 483). Jack Lohr, one of Prater's lieutenants (R. 60) who "helped me out quite a bit" (R. 879), was identified as being present when the partnership tipple was dynamited under circumstances which implicated his participation in that episode (R. 492, 493, 499-503). Shortly after the auger of S & R was dynamited Hubert Bailey, Herman Justice, Johnny Cox, Esom Bryant and Clarence Bryant wound up in jail in Kentucky charged with public drunkenness and carrying concealed deadly weapons; the Bryants, while in jail, became implicated in participation in this dynamiting episode (R. 798, 799, 804, 805). A day or two after the dynamiting Hubert Bailey and Herman Justice were overheard bragging about how "they could make a damn big boom" (R. 572, 574). Not one of these lieutenants of Prater and Daniel appeared as a witness upon the trial of these cases, and the testimony concerning them, and the inferences to be drawn therefrom, stands without contradiction in the record.

At the time the tipples of Gilchrist & Sons were blasted shortly after midnight, Prater was in bed in his hotel room, three or four blocks away. The first blast shook him up, but he did not get out of bed. At the second blast, he did jump out of bed (R. 890, 891). Then he did a very strange thing. The union had been accused of all manner of bad behavior—falsely, according to Prater. The union had been enjoined, on a representation to the court that it was violating the laws. Prater was supposedly struggling to preserve the union's good name. Nevertheless, when two explosions shattered the main street of Jellico in the middle of the night, Prater merely crawled back into bed and went to sleep. The next morning, when he went out to get his breakfast and observed the devastation, he did not even bother to ask anyone what had happened, or who was responsible (R. 891). He did, however, exhibit enough interest in the event to try to secure the release from custody of the men who were accused of doing the job (R. 686).

Because respondents were unable to produce any eye witnesses to the events, and had no specific confession from the petitioner as to delegation of authority, it is now argued that the two lower courts committed obvious and exceptional error in holding the petitioner liable for the destruction of the partnership tipples and the auger of S & R. Apparently the petitioner takes the position that responsibility for the destruction of the tipples and auger cannot be fastened on it by circumstantial evidence.

It is a novel proposition to assert that circumstantial evidence cannot be the basis of the findings of liability by the lower courts in these cases as in any other case. In the case of *United Mine Workers of America v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, the District Court held the union responsible for blowing

up railroad tracks serving the mine, which determination was based upon circumstantial evidence. In *Rogers v. Missouri P. R. Co.*, 353 U. S. 500, 508, the Court made this observation about a responsibility for damages being fixed by circumstantial evidence:

> "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

To this is appended a footnote, referring to *The Robert Edwards* (U. S.), 6 Wheat. 187, 190, 5 L. Ed. 238, to the effect that:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."

In *Gearhardt v. American Reinforced Paper Co.*, 7th Cir., 244 F. 2d 920, the Court of Appeals awarded damages based upon liability established solely by circumstantial evidence, and in this regard the court quoted other opinions with approval, as follows:

> "Generally speaking, direct and positive testimony to specific acts of negligence is not required to establish it. Circumstantial evidence is sufficient, either alone or in combination with direct evidence. Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inference drawn must be reasonable. But there is no requirement that the circumstances to justify the inferences sought, negative every other positive or possible conclusion. * * * Inferences made from probative facts do not constitute legal speculations if they can be said to be probabilities by the test of common judgment."

In *Schauffler v. Highway Truck Drivers & Helpers*, 3 Cir., 230 F. 2d 7, 10, a secondary boycott case, the court stated:

> "On the other hand, agency may be established by other means than a direct statement from an alleged employer that someone is his agent, or the showing of a written power of attorney on the part of a principal to have another act for him. It can, of course, be proved by circumstantial evidence, as can any other proposition."

In considering the reasonable inferences which may be drawn from the circumstantial evidence in this case, reference is again made to the fact that the implicated union lieutenants of Prater and Daniel did not appear as witnesses in these cases. It is the general rule that, in such a situation, a party is presumed to neglect the production of a friendly witness because that witness, if produced, would give testimony detrimental to the party. The rule is thus expressed in Kentucky in the case of *Huber & Huber Motor Express v. Martin's Admr.*, 265 Ky. 228, 233, 96 S. W. 2d 595:

> "It is the prevailing rule that where it lies within the power of a litigant to produce a witness or any evidence on an issue and he fails to do so, creates the presumption that the testimony of the witness or other evidence, if produced, would have been unfavorable to such litigant."

The case of *Vigderman v. U. S.*, E. D. Pa., 175 F. Supp. 802, was an action to recover under the Federal Tort Claims Act for the death of an employee of a private corporation assigned to perform services for the United States Air Force. It involved an airplane crash, and turned upon the position of the landing gear and flaps at the time a turn was executed. The government investigated the ac-

cident, and two eye witnesses (presumably Air Force personnel) were in a position to observe the airplane at the time of the turn, but they were not produced as witnesses. On this point, the court observed (p. 809):

> "Particularly applicable to this situation is the rule that where a party (here, the United States) fails to produce witnesses within its control who presumably are best informed on the subject of investigation, especially if their relations with such party are not hostile but are friendly, so that their bias, if any, would be in such party's favor, it may be inferred that the information that would be provided would be unfavorable to such party."

Applying this rule, the court inferred that the landing gear and flaps were negligently extended at the time the turn was made, and based an award to the estate of the deceased employee on this act of negligence.

In conclusion on this point, attention is directed to the opinion of the Court of Appeals where, after a thorough consideration of these cases, the court stated (Appendix to petition, 7a):

> "We are satisfied that the District Judge correctly applied the rules of law with respect to the issues of liability and damage."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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